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No. 92-516

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

DAKOTA GASIFICATION COMPANY
and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Circuit properly applied common law rules of contract construction to determine that the Secretary of Energy (and its successor-in-interest, Dakota Gasification Company) did not agree to arbitrate disputes with Petitioner.

STATEMENT PURSUANT TO RULE 29.1

Dakota Gasification Company's parent corporation is Basin Electric Power Cooperative. Dakota has no subsidiaries to be listed under this Rule.

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BRIEF OF RESPONDENT DAKOTA GASIFICATION COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Dakota Gasification Company (hereinafter "Dakota") urges the Court to deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit. The court below correctly construed the contracts at issue to determine that there is no agreement which would require the United States and

its successor-in-interest, Dakota, to arbitrate claims against the defendants.

STATEMENT OF THE CASE

The sole issue in the case below was whether the Secretary of Energy (and its successor, Dakota) agreed to arbitrate disputes under reinstated contracts for the sale and transportation of synthetic gas manufactured by the Great Plains Gasification Project ("the Project"). The original contracts were part of a complex transaction to federally finance the construction of a one-of-a-kind synthetic fuels plant. The plant was built to demonstrate the feasibility of manufacturing synthetic natural gas from coal on a commercial scale.

Background

Affiliates of five interstate pipelines formed a partnership to finance, construct and own the Project. The partnership required four affiliated pipelines to execute long-term high-cost Gas Purchase Agreements so as to ensure a market for the synthetic gas.[1]

The Federal Financing Bank agreed to lend up to $2 billion to the partnership for the construction of the Project provided that the Secretary of Energy would guarantee the loan. As a condition precedent to guaranteeing the loan, the Secretary of Energy required each of the pipelines to enter into the Pipe-

[1] The four pipeline purchasers are Petitioner, Transcontinental Gas Pipe Line Corporation, ANR Pipeline Company, Natural Gas Pipeline Company of America and Tennessee Gas Pipeline Company. The latter three have filed a brief in support of the Petition. The four pipeline purchasers are jointly referred to as the "pipelines."

line Affiliates Agreement. Therein, the pipelines promised the Secretary that if their partner affiliates defaulted on the guaranteed loan, the pipelines would agree to reinstate the Gas Purchase Agreements with the Secretary of Energy in accordance with the terms of the Pipeline Affiliates Agreement.

Original Gas Purchase Agreements

The four identical original Gas Purchase Agreements were negotiated between the partnership and the four affiliated pipelines.[2] The pipelines guaranteed the partnership a long-term (25 years) market for the *entire* output of the Project and agreed to pay top of the market prices for the synthetic gas. Execution of the original Gas Purchase Agreements by the pipelines was a condition precedent of the partner affiliates' agreement to invest capital and construct the Project. Pet. App. at F-19, Article XII, § 1. The partnership and their affiliated pipelines agreed to resolve disputes under the original Gas Purchase Agreements through binding arbitration. Pet. App. at F-24, Article XVIII. They further agreed that the law of Illinois would apply to disputes under the agreements. Pet.

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[2] At the time the original Gas Purchase Agreements were executed, it had not been resolved how the synthetic gas would be delivered from the plant for further transportation to the pipeline purchasers' markets. The Gas Purchase Agreements therefore required that the parties execute transportation agreements before the plant was placed into operation. Petitioner's Appendix at F-10 to F-11 ("Pet. App. at ___"), Article VI, § 2. Each of the pipelines fulfilled this obligation by executing a Synthetic Gas Transportation Agreement with GPGA in June 1983. Pet. App. G. These transportation agreements are mere adjuncts to the Gas Purchase Agreements and should be construed as such. The Secretary of Energy was not a party to those agreements.

App. at F-24, Article XVII. Finally, the partnership and their affiliated pipelines agreed that in the event of default, the contracts could be assigned to the Secretary or his designee. Pet. App. at F-22, Article XIV.

The Pipeline Affiliates Agreement

The Secretary of Energy was not a party to the original Gas Purchase Agreements. Rather, the Secretary's rights concerning the sale of synthetic gas in the face of default and foreclosure were protected through the simultaneously executed Pipeline Affiliates Agreement, under which the pipelines agreed to reinstate the Gas Purchase Agreements in the event of default. Pet. App. at H-2, § 2.02. That agreement expressly provides that disputes with respect to the Secretary's rights would be litigated in federal district court in North Dakota or the District of Columbia. Pet. App. at H-9 to H-10, § 4.10 It further provides that federal law, as opposed to the law of Illinois, would control. Pet. App. at H-6, § 4.02. Moreover, to ensure the Secretary the option of selling the plant, the Pipeline Affiliates Agreement expressly states that the rights of the Secretary would enure to the benefit of his successors. Pet. App. at H-9, § 4.07.

Default and Reinstatement

The partnership defaulted in 1985. Despite the Secretary's right to become successor-in-interest to the partnership under the original Gas Purchase Agreements, the Secretary terminated the original Gas Purchase Agreements and reinstated them pursuant to the Pipeline Affiliates Agreement. The pipelines challenged the reinstatement and the Secretary brought suit to enforce the Reinstated Gas Purchase Agreements. The pipelines raised affirmative defenses re-

lated not only to the Secretary's reinstatement but also to the pipelines' obligations under the Reinstated Gas Purchase Agreements.[3] Both the district court and the court of appeals held that the pipelines were obligated to continue to purchase the entire output of the Project at the formula based prices under the Reinstated Gas Purchase Agreements with the Secretary. *United States v. Great Plains Gasification Associates*, 819 F.2d 831, 834 (8th Cir. 1987).

Sale to Dakota and Resulting Disputes

In October 1988 Dakota purchased the Project from the Secretary of Energy and the Secretary assigned the Reinstated Gas Purchase Agreements to Dakota. Dakota committed to continue operating the Project so long as revenues from the sale of synthetic gas under the Reinstated Gas Purchase Agreements exceed expenses, or until the Reinstated Gas Purchase Agreements terminate or expire. Thus, as successor-in-interest to the Secretary, Dakota has a critical interest in the enforcement of the gas purchase agreements.

Immediately upon the closing of Dakota's agreement with the Secretary, one of the pipelines challenged the assignment of the Reinstated Gas Purchase Agreements to Dakota. Others renewed old challenges to their volumetric purchase obligations and the price owed under the Reinstated Gas Purchase Agreements.

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[3] The pipelines sought to limit their purchase obligation to an amount less than their contractual shares of the entire output of the Project. There was also an effort to limit the price to a market based price as opposed to the formula based prices in the Gas Purchase Agreements.

The Present Litigation

In 1990, ANR demanded arbitration of disputes concerning the volume it must purchase under its Reinstated Gas Purchase Agreement and the price it must pay under both the purchase and transportation agreements. Dakota and the Secretary of Energy brought one suit to resolve all the issues with all the pipelines. The pipelines filed motions to dismiss claiming that the disputes must be individually arbitrated. The district court dismissed the action. The Eighth Circuit reversed, holding that the Secretary of Energy and its successor, Dakota, had preserved the prerogative to litigate disputes arising under the contracts as reinstated through the Pipeline Affiliates Agreement.[4]

REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate that this Court should grant certiorari to review the decision of the

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[4] Neither the district court nor the Eighth Circuit reached the question of what arbitration law would apply if the United States and Dakota were subject to an agreement to arbitrate. Contrary to Petitioner's assertions, it is not clear that federal law would apply. The Gas Purchase Agreements as originally in effect were to be "governed and interpreted in accordance with the Laws of the State of Illinois." Pet. App. at F-24, Article XVII. Thus, if the reinstatement of the Gas Purchase Agreements pursuant to the Pipeline Affiliates Agreement did not affect the terms of those agreements (as the pipelines contend), then any arbitration under those agreements would be governed by Illinois arbitration law, Ill. Rev. Stat. ch. 10, ¶¶ 101 *et seq.* *See Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) ("Just as [parties] may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted.").

Eighth Circuit and has provided no basis for summary reversal of the decision below.

1. The Decision of the Eighth Circuit Does Not Conflict With the Decisions of This Court

This Court has unequivocally established that where the parties have agreed to arbitrate, that agreement will be enforced. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).[5] *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Agreements to arbitrate should be placed " 'upon the same footing as other contracts . . . .' " *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974), quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924).

It is equally well established that arbitration will be ordered only where the parties agree, by contract, to arbitrate. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648-49 (1986). *See also Dean Witter Reynolds*, 470 U.S. at 219.

Therefore, the "first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors*, 473 U.S. at 626. In resolving the question of whether the parties have agreed to arbitrate, the court applies "general state-law principles of con-

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[5] *Dean Witter Reynolds* involves construction of the Federal Arbitration Act, which itself arose out of an effort "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate." 470 U.S. at 219-20. The Federal Arbitration Act and the decisions involving its application have laid such hostility to rest.

tract interpretation . . . ." *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 475-76 (1989).

Consistent with the straight-forward teaching of these cases, the Eighth Circuit simply applied common law principles of contract interpretation to the contracts at issue to determine whether the Secretary of Energy and its successor, Dakota, had agreed to arbitrate disputes. The Eighth Circuit determined that the Secretary (and its successor) had not agreed to resolve disputes through arbitration.

In *Volt* the Court explained the federal policy favoring arbitration, articulated in cases such as *Moses H. Cone*,[6] as "simply [ensuring] the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476. The Eighth Circuit's interpretation of the contracts before it, holding that the United States (and its successor) are not required to arbitrate because they have not agreed to do so, offends neither the rules of liberal construction set forth in *Moses H. Cone*, nor any other decision of this Court.

2. The Decision Does Not Create a Conflict Between the Circuits

Petitioner seeks to manufacture a non-existent conflict between the circuits by erroneously arguing that *Patten Securities Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400 (3d Cir. 1987), stands for a black letter rule that an arbitration clause "trumps" a forum selection clause. It does not. Such a rule of preference—without regard to the contracts at issue—

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[6] *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

would violate this Court's dictate that arbitration is appropriate only where the parties have agreed, by contract, to arbitrate. *Mitsubishi Motors*, 473 U.S. at 625. Such a rule would further conflict with this Court's ruling that the court should apply general state law principles of contract interpretation in determining whether the parties have agreed to arbitrate. *Volt*, 489 U.S. at 475-76.

Application of this Court's arbitration precedents to the disparate facts in *Patten Securities* and the decision of the Eighth Circuit demonstrates that *Patten Securities*, like the decision of the Eighth Circuit, is fact bound. There is no conflict between the circuits.

The *Patten Securities* court was faced with construing two simultaneously effective clauses: one an arbitration clause in the NASD member rules and the other a forum selection clause in the underwriting agreement. Tacitly applying the rules of construction that the agreements must be read together and that where possible both agreements should be given effect, the Third Circuit reconciled the two clauses. It held that the parties had agreed to arbitrate and that the forum selection clause would limit the venue of the court that could enforce the award in arbitration.

The Eighth Circuit faced very different facts. First, unlike *Patten Securities*, the contracts presented to the Eighth Circuit demonstrated that the forum selection clause and the arbitration clause (in the original contracts) could never be effective at the same time. Rather, the forum selection clause (in the Pipeline Affiliates Agreement) would become effective *only* if the partners defaulted on the mortgage and the

Secretary terminated and reinstated the contracts under the Pipeline Affiliates Agreement.

Petitioner itself has illustrated the difference between the two factual settings, since Petitioner does not seek in this case the same result reached in *Patten Securities*. The forum selection clause at issue here designates only the federal courts of North Dakota and the District of Columbia for the resolution of disputes. If that clause were to be construed in accordance with the holding in *Patten Securities*, then any arbitration award between the Petitioner and Dakota could only be enforced in one of those two forums. Yet Petitioner insists upon the right to pursue its arbitration against Dakota within the context of an action in federal court in Texas.[8]

A second, critical difference between this case and *Patten Securities* is that the Secretary of Energy was not a party to the contract with the arbitration clause *and* lacked the authority to agree to such arbitration. The Secretary of Energy had not been given the statutory authority needed to bind the United States to resolve disputes through arbitration and therefore could not agree to arbitrate its disputes under the reinstated contracts. As the Eighth Circuit held, the Secretary preserved the prerogative to litigate disputes involving its rights under the reinstated contracts through the execution of the Pipeline Affiliates Agreement.

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[7] *Transcontinental Gas Pipe Line Corp. v. Dakota Gasification Co.*, Civil Action No. H-90-3453 (S.D. Tex.). Dakota has preserved its right to appeal the Texas decision at such time as Petitioner may seek to enforce an arbitration award.

The Third Circuit itself recognized in *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729 (3d Cir. 1989), that the pro-arbitration policy "does not prevent parties from agreeing to exclude matters from arbitration if they so desire." *Id.* at 733 (citing *Volt Information Sciences*). In *Ballay*, a securities dealer sought to invoke the arbitration clauses in its customer contracts to compel arbitration of its customers' claims under the federal securities laws. The Third Circuit affirmed the district court's interpretation of those arbitration clauses as not covering the claims at issue.

The decision below and *Patten Securities* are not in conflict. Neither decision establishes a rule of preference for cases which involve both an arbitration clause and a forum selection clause. Rather, both cases stand for the unremarkable proposition that a court must apply the general principles of contract construction to determine whether the parties have agreed by contract to arbitrate a dispute. *Mitsubishi Motors*, 473 U.S. at 625-26. Both courts applied those general rules of construction to reach the result dictated by the specific facts presented. Neither case establishes a blind rule and the decisions do not conflict.[8]

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[8] Petitioner briefly cites *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34 (5th Cir. 1990), and *Travel Consultants, Inc. v. Travel Management Corp*, 367 F.2d 334 (D.C. Cir. 1966), to bolster its claim of a conflict among the circuits. Neither case involves a conflict between an arbitration provision and a forum selection clause. Rather, each case simply involves a fact-specific determination as to the scope of an arbitration clause in one of several contracts.

3. The Decision Raises No Significant Issues

Despite the efforts of Petitioner to paint this decision as one with "important consequences" for alternative dispute resolution, it is not. This case is consistent with the law of this Court and the Eighth Circuit favoring enforcement of arbitration agreements. Moreover, the decision in this case is limited to its facts and simply will not have an effect on the enforceability of arbitration clauses.

The Eighth Circuit has a well established body of law fully recognizing the liberal federal policy favoring enforcement of arbitration agreements. *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986); *Johnson Controls, Inc. v. City of Cedar Rapids*, 713 F.2d 370 (8th Cir. 1983). However, there is no policy blindly requiring arbitration regardless of the agreement of the parties; there is merely a policy which favors the enforcement of arbitration *agreements. AT&T Technologies, Inc.* 475 U.S. at 648-49 (1986); *I.S. Joseph Co.*, 803 F.2d at 399-400 (an order compelling arbitration "must find its source in a *real agreement* between the parties," as "determined under the common law of contract") (emphasis added).

The panel decision does not modify the law of the Eighth Circuit concerning arbitration. Significantly, the decision was brought to the entire Eighth Circuit through a suggestion for rehearing *en banc*, where the pipelines argued that the decision conflicted with the Eighth Circuit's law on arbitration. After requesting briefs responding to the suggestion for rehearing *en banc*, the Eighth Circuit denied such rehearing and allowed the panel decision to stand.

This decision involves nothing more than the application of rules of contract construction as described

by *Williston* and *Corbin* to a unique and complex set of contracts involving an equally complex and novel transaction. The Secretary of Energy agreed to guarantee a loan of up to $2 billion made by the Federal Financing Bank to private parties for financing, construction and operation of a plant which would demonstrate the commercial feasibility of manufacturing synthetic natural gas from coal. The contracts reflect the special interest of the federal government as loan guarantor, and the interpretation of those contracts by the Eighth Circuit does not signal a departure from the well established precedents to enforce agreements to arbitrate.

4. The Eighth Circuit Reached the Correct Result

The decision of the Eighth Circuit below turns on the interpretation of conflicting provisions of separate contracts simultaneously executed as part of the same transaction. The pipelines asked the court to find a construction of the Pipeline Affiliates Agreement that would not affect their purported arbitration rights under the originally executed Gas Purchase Agreements.

The pipelines' arguments ignore the fact that the government conditioned its guarantee on the pipelines first signing the Pipeline Affiliates Agreement and that, therefore, "the Gas Purchase Agreements and the Pipeline Affiliates Agreement must be interpreted collectively, and not in isolation . . . ." Pet. App. at A-8.

The Pipeline Affiliates Agreement expressly stated that its execution was "a condition precedent to the issuance of the Guarantee by the Secretary," and that the parties "consent to the jurisdiction in any United

States District Court . . . in connection with any suit to enforce the rights of the Secretary hereunder." Pet. App. at H-1; Pet. App. at H-9 to H-10.[9]

In order to give the Pipeline Affiliates Agreement its intended effect, the Gas Purchase Agreements as reinstated following default by the affiliated Project sponsors must be subject to the dispute resolution provision that the pipelines and the Secretary of Energy agreed to in the Pipeline Affiliates Agreement. The Pipeline Affiliates Agreement expressly provided that the Secretary's benefits "shall enure to the benefit of . . . successors . . . ." Pet. App. at H-9.

The Eighth Circuit applied the rules governing interpretation of simultaneously executed contracts to the agreements before it and properly concluded that the pipelines agreed, by entering into the Pipeline Affiliates Agreement, that disputes arising under the Reinstated Gas Purchase Agreements would be litigated.

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[9] The pipelines, as well as the dissent below, would construe this clause as applying only to the one-time act of reinstating the Gas Purchase Agreements, and not to those contracts as reinstated. However, such a narrow construction simply ignores the fact that the Secretary of Energy lacks the statutory authority to submit disputes with the United States to binding arbitration. It also ignores the record of the United States' suit to reinstate those contracts in which the pipelines raised and litigated issues involving their obligations under those contracts. *United States v. Great Plains Gasification Associates*, 819 F.2d 831, 834 (8th Cir. 1987). If the issues arising under those contracts had been subject to arbitration, as the pipelines now assert, the pipelines should have moved to sever those issues for arbitration. *See DeanWitter Reynolds*, 470 U.S. at 217; *Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 62 (8th Cir. 1984). They did not.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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